

TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996 (TOLATA)

PRACTICE & PROCEDURE

By James Normington

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1. FUNDING

- 1.1 The Administration of Justice Act 1999 precludes funding for all matters of trust law. The Lord Chancellor has however created an exception for applications under s. 14 of TOLATA, where the matters concern the ownership or possession of the client's home. Advisers should make clients aware of the implications of the statutory charge from the outset, further assistance can be obtained from the Funding Manual.
- 1.2 Conditional Fee Arrangements (CFAs) may be possible. It should however be noted that it is not possible to enter into CFAs in "family

proceedings". This precludes proceedings under any one or more of the following;

- (A) The Matrimonial Causes Act 1973
- (B) The Adoption Act 1976
- (C) The Domestic Proceedings and Magistrates' Courts Act 1978
- (D) Part III of the Matrimonial and Family Proceedings Act 1984
- (E) Parts I, II & IV of the Children Act 1989
- (F) Part IV of the Family Law Act 1996
- (G) The inherent jurisdiction of the High Ct in relation to children

When considering CFAs advisors should consider whether alternative sources of funding are available, including public funding.

2. INTIAL STEPS

- 2.1 Often in the initial stages of trusts litigation it is necessary to protect a client's position regarding the property, particularly where they are not registered as a proprietor. It may be necessary to consider restrictions, interim injunctions or undertakings.
- 2.2 **Restrictions**:- Registering a restriction against the property with the land registry. Application can be made to the Land Registry on form RX1 (download www.landregistry.gov.uk). Will need to demonstrate that the applicant has sufficient interest in the property before making an entry. Applicant will need to make a declaration at point of application setting out the way in which the applicant is entitled to apply for a restriction. Legal advisors must be satisfied that a beneficial interest exists, otherwise the lodging a restriction without reasonable cause could result in a person suffering loss and damage as a consequence will have cause to an action in damages against the applicant.

- 2.3 **Interim injunctions:**- Where property in dispute is about to be sold an interim injunction can be sought to prevent sale (*Dance v Goldingham* (1873) 8 Ch. App. 902), or to prevent the dissipation of the proceeds of sale. Jurisdiction to grant such injunctions arises under the Supreme Courts Act 1984, s. 37 (1) for High Court and County Courts Act 1984, s.38 (as amended) in County Court. Advisers will need to consider the following;
- (A) CPR 25 relates to provisions for interim remedies, inc. interim injunctions. Application for injunction must be made in accordance with CPR23 & PD 23
- (B) Factors the court will consider as set out in *American Cyanamid v Ethicon Ltd* [1975] A.C. 396. In addition to the factors set out in *American Cyanamid* it is normally a requirement that the applicant give a cross-undertaking in damages.
- 2.4 **Undertakings:**- Rather than obtaining an injunction it may be possible to obtain undertakings from the proposed Defendant that the property will not be disposed of pending resolution of the dispute. Undertakings are preferable to an agreement between the parties since the former is punishable as a contempt of court.

3. EVIDENCE

- 3.1 It is always important to try and obtain a copy of the original conveyancing file. Where the property has been purchased in the sole name of one party, the conveyancing file may well cast light on the reason for this. The conveyancing file may also assist where the property has been purchased in joint names but without any express declaration of trust.
- 3.2 A copy of the mortgage application form should be obtained where possible.

- 3.3 Where the client asserts that direct contributions to the purchase price were made it is important to obtain evidence in support of this assertion. Normally this will take the form of bank statements.
- 3.4 Where the client asserts that the parties were engaged. It is important to obtain supporting evidence, such as the existence of an engagement ring. It is likely that the proposed Defendant will deny that the ring was purchased with the intention of marriage. It is always advisable to prepare for this situation by taking detailed instructions as to the circumstances of the engagement, whether any celebration took place and whether there are any witness to confirm the engagement.
- 3.5 Where a claim is based upon a limb one type constructive trust (“agreement, arrangement or understanding” *Lloyds Bank v Rosset* [1991] 1 AC 107) the witness statements should set out as much detail as possible the nature of any agreement/arrangement. This should include;
- (A) when the conversation took place,
 - (B) Where it took place,
 - (C) Were any witnesses present,
 - (D) Was anything reduced to writing which might support the account.
- Where a limb two type constructive trust is the basis for the claim it is important to set out the precise nature of the contributions.

4. PRE-ACTION PROTOCOL

4.1 There is currently no pre-action protocol for TOLATA, nevertheless the court will expect the parties to act in accordance with the overriding objective and ensure that the parties are on an equal footing.

4.2 The issue of mediation or some form of ADR needs to be addressed. Mediation is often a worthwhile option. Unlike ancillary relief cases once

proceedings have been issued Claims can be listed for trial relatively quickly and sometimes with only one CMC. Unlike ancillary relief case there is limited scope for mediation/ADR

5. VENUE

- 5.1 First advisers need to consider whether to issue in the High Ct or County Ct. The High Ct is the appropriate forum if by reason of
- (A) the value of the claim or the amount in dispute AND
 - (B) the complexity of the facts/legal issues/remedies/procedures.
 - (C) the importance of the outcome of the claim to the public at large.
- 5.2 If the case is to be issued in the High Ct then it must be considered which division the claim should proceed under. The alternatives are the Family Division or the Chancery Division. Family should be suggested if:
- (1) involves children or an application under sch.1 of Children Act 1989
 - (2) parties were engaged
 - (3) parties lived together for a reasonable length of time as if they were man & wife.

Suggest Chancery if:

- (1) Requires application of strict law
- (2) Ancillary issues (i.e. where rescission/rectification of a deed is sought on grounds of fraud, mistake or undue influence)
- (3) Chancery guide provides additional practical information not already contained in the CPR & PDs.

6. JURISDICTION & FORUM

6.1 Legal advisors should consider the location of the property in question and the concept of *Lex situs*, “the law governing the determination of rights to and interests in real property is the law of the jurisdiction in which the property is situated..”. The legal advisor must consider how the property rights

-rights *in rem* (i.e. the property is the object of the proceedings)→ member states in which it is situated.

-rights *in personam* → Webb v Webb [1994] QBD 696 held that a beneficial interest could be a right *in personam*. *In personam* will not offend the courts and English courts can have jurisdiction over such proceedings.

Advisors should be aware that the courts will not tolerate forum shopping, and may strike out cases that do not have a clear and substantial link to the English jurisdiction.

7. PART 8

7.1 TOLATA claims can be brought under Part 8. There are, however, several disadvantages to using the Part 8 procedure:

(A) Cases brought under TOLATA often concern complex issues of both fact and law. It may be difficult for both defendant and the court to identify those issues unless they are set out clearly by way of Particulars of Claim.

(B) The defendant may object to the use of Part 8 procedure. If he does so and the court determines that the claim should continue as under Part 7 the claimant may lose the opportunity to set out its case in Particulars of Claim, although the defendant will be given the opportunity to file a defence.

8. Costs & Part 36 Offers

8.1 Unlike Ancillary Relief cases, the losing party is likely to end up paying both his own costs and those of the successful party which can often be significant. It is not unusual for one party's costs to be at least £10,000. It is therefore essential to address the client on the issue of costs at the outset and to ensure the client remains aware of the costs implications of their actions. Advisors should make clients aware of the implications of failing to mediate as well as their conduct throughout the litigation.

8.2 Advisers should consider using Part 36 offers in a realistic and appropriate manner.

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